* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 3rd January, 2011*
*Pronounced on: 6th February, 2012*

\+ **MAC.APP. 529/2005**

THE ORIENTAL INSURANCE CO. LTD. ..... Appellant
Through: Mr. Pratik Datta, Adv.

versus

BAIJNATH DASS & ORS. .... Respondents
Through: Mr. B. P. Sharma, Adv. for R-4.

**CORAM:**
**HON'BLE MR. JUSTICE G.P.MITTAL**

**J U D G M E N T**

**G. P. MITTAL, J.**

**C.M. APPL. No.10963/2012 (for recalling of Order dated 20.04.2007) & C.M. APPL. No.10964/2012 (for stay)**

1. The Applicant (the fourth Respondent) prays for setting aside of the order dated 20.04.2007 and for rehearing of the Appeal on merits on the ground that the Applicant was getting treatment for brain tumor in Delhi and could not receive any notice issued by this Court. He was unaware of the Court proceedings. It is averred that in another matter (relating to this very accident in respect of other Claimants) a first Appeal was filed by the Applicant and the Appellant appeared as a Respondent in the Appeals No.113 and 121/2005. It is stated that the grounds taken by the Appellant in MAC. APP. No.259/2005 (the Appeal

in which the C.M. APPL. has been filed) are afterthought. These have not been substantiated by any evidence. It is stated that the Applicant could not appear before the Court on account of non-receipt of notice by him and due to shifting of his residence to Delhi in order to obtain treatment for the brain tumor.

2. The Application is opposed by the Respondent (the Appellant in Appeal No.529/2005 decided on 20.04.2007). It is denied that the Applicant was not served with the notice of Appeal. It is averred that even if it is assumed that the Applicant received any treatment, the same was only in the year 2010, as could be gathered from the documents filed along with the Application. It is pleaded that no cause has been shown for the Applicant's absence after service of notice of the Appeal and on the date of hearing when the order dated 20.04.2007 came to be passed.

3. A Claim Petition bearing No.320/2003 titled *Baijnath Das & Anr. v. Jai Dev Singh & Ors.* came to be decided by the Claims Tribunal by an order dated 19.03.2005 whereby a compensation of ₹ 5,02,500/- was awarded in favour of the Claimants (Respondents No.1 and 2 in MAC. APP. No.529/2005). One of the grounds taken by the Non-Applicant (the Oriental Insurance Co. Ltd.) was that the Cover Note in respect of the vehicle No.UP-06-3233 was issued after the accident and date of coverage was anti dated by its Development Officer. Action was taken against the Development Officer in accordance with

the General Insurance (CDA) Rules, 1979 and a penalty of reduction in basic pay to the lowest stage in the time scale of pay and recovery of ₹ 1,00,000/- was imposed upon him. Since, this defence was not taken into consideration by Claims Tribunal, the Appeal (MAC. APP. No.529/2005) was filed for setting aside of the order dated 19.03.2005 passed by the Claims Tribunal.

4. By an order dated 20.04.2007 (subject matter of this Application), the recovery rights were granted to the Non-Applicant on the ground that no liability could be fixed on the Insurance Company on the basis of a Cover Note or a policy from the Insurance Company obtained by fraud. This Court by order dated 20.04.2007 observed that since the Insurance Company had already satisfied the claims of some other Claimants arising out of this very accident, the Insurance Company cannot discriminate the Claimants concerned in the Appeal and thus while making the Non-Applicant (the Insurer) to pay the award amount, recovery rights were granted against the Applicant.

5. This was only to give the background. The merits of the case, however, are not relevant for the disposal of the present Application, which is simply on the ground that the Appellant was prevented to appear at the hearing of the Appeal on account of sufficient cause. Rule 21 of Order XLI of Code of Civil Procedure is extracted hereunder: -

> "*21. Re-hearing on application of respondent against whom ex parte decree made – Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.*"

6. This Appeal was instituted in July, 2005 and came up for hearing before the Court for the first time on 08.07.2005. The notices were issued repeatedly for service of Respondent No.4 i.e. the present Applicant. A perusal of the Court record shows that a notice was personally delivered upon the Applicant on 01.09.2005 for his appearance in the Court on 29.09.2005. The notice was received by him under his own signatures at village Paidul, District Pauri Garhwal, Uttarakhand. Since, this notice was served through the Process Server of the District Court, Pauri Garhwal, an endorsement in respect of the service was made and notice duly served was returned to this Court. Since, the notice was not returned by 29.09.2005 another notice was sent for the Applicant's appearance for 02.12.2005. This notice was again personally served upon the Applicant on 16.11.2005. Another notice for appearance of the Applicant before the Court on 17.04.2006 was also served. The matter came to be listed

before the Court on 04.05.2006 when the Court noticed the absence of Respondents No.3 & 4 (despite service).

7. It is important to note that successive notices were served upon the Applicant for his appearance before the Court. He preferred not to appear in person or through an Advocate in spite of due service. So far as the Applicant's service is concerned, he cannot have any grudge that he was not served personally.

8. Now coming to the Applicant's plea that he was suffering from brain tumor and, therefore, was not in a position to attend the Court. Very surprisingly the Application is completely silent as to when the Applicant suffered from the disease or in other words when he had difficulty because of this disease. Para 2 of the Application is extracted hereunder: -

> "*2. That the present applicant/ respondent was getting treatment for brain tumor in Delhi and could not get any notices issued by the Hon'ble Court and consequently due to his medical condition was unaware of the proceedings conducted by this Hon'ble Court the medical papers of the applicants are filed as Annexure R-1 (Colly).*"

9. The Applicant has placed on record photostat copies of the treatment papers running into 25 pages. All these papers pertain to the year 2010. The Applicant's treatment in 2010 could not have prevented him from appearing in the Court in the year 2005 to 2007 when the Notices were repeatedly served on him

and when the MAC. APP. No.529/2005 came to be disposed of by an order dated 20.04.2007. It may be noted that even after filing the instant Application (C.M. APPL. No.10963/2012) the Applicant was not very vigilant. None appeared on his behalf on 17.01.2012 and a default Notice had to be issued to the Applicant's counsel.

10. The Applicant has failed to show that he was not served with the Notice. As stated earlier the record clearly depicts that he was personally served with the notice of the Appeal not only once but thrice. There is no averment that he was prevented by sufficient cause to appear before the Court since the service of the notice in the year 2005/ 2006 and then at the time of hearing of the Appeal.

11. The Application is frivolous; the same is accordingly dismissed.

12. In view of the above, C.M. APPL. No.10964/2012 also stands disposed of.

13. No costs.

**(G.P. MITTAL)**
**JUDGE**

**FEBRUARY 6, 2012**
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